BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DALE L. STILWELL	)	
Claimant	)	
VS.	)	
	)	
BOEING COMPANY and	)	Docket Nos. 253,800
CESSNA AIRCRAFT COMPANY	)	& 1,031,180
Respondents	)	
	)	
AND	)	
	)	
INSURANCE COMPANY OF THE STATE OF	)	
PENNSYLVANIA and CESSNA AIRCRAFT	)	
COMPANY (self-insured)	)	
Insurance Carriers	)	

ORDER

Respondent Cessna Aircraft Company (Cessna) appeals the September 17, 2008, Award of Administrative Law Judge John D. Clark (ALJ). Claimant was provided awards for two separate scheduled injuries, each for a 37 percent impairment for injuries suffered to each leg. Both awards were assessed in Docket No. 1,031,180, against respondent Cessna. Respondent Boeing was found to have no responsibility for the alleged injuries to claimant's bilateral lower extremities in Docket No. 253,800.

Claimant appeared by his attorney, David H. Farris of Wichita, Kansas. Respondent Boeing Company (Boeing) and its insurance carrier Insurance Company of the State of Pennsylvania appeared by their attorney, Kirby A. Vernon of Wichita, Kansas. Respondent Cessna, a self-insured, appeared by its attorney, Dallas L. Rakestraw of Wichita, Kansas.

The Appeals Board (Board) has considered the record[1] and adopts the stipulations contained in the Award of the ALJ. At oral argument to the Board, the parties stipulated that a 37 percent functional impairment to each lower extremity is appropriate for the injuries suffered by claimant. Additionally, respondent Cessna admitted responsibility for

[1] The Preliminary Hearing and Post Award Hearing listed in the Award as occurring on November 28, 2008, actually took place on November 28, 2006.

the injuries suffered to claimant's right lower extremity on September 14, 2006. There remains a dispute as to which respondent should be responsible for the injuries to claimant's left lower extremity and whether respondent Cessna is entitled to a credit for any preexisting impairment claimant may have suffered to his right lower extremity. The Board heard oral argument on December 19, 2008.

ISSUES

1. Did claimant suffer accidental injuries to his left lower extremity while working for respondent Cessna, in Docket No. 1,031,180, or are claimant's left lower extremity problems a natural and probable consequence of injuries suffered while working for respondent Boeing, in Docket No. 253,800?

2. Is respondent Cessna entitled to a credit for a preexisting 5 percent functional impairment to claimant's right lower extremity?

FINDINGS OF FACT

Claimant was employed by Boeing from 1997 to 1999. While there, he suffered injuries to his bilateral knees, resulting in surgeries being performed by orthopedic surgeon Kenneth A. Jansson, M.D. The surgeries consisted of diagnostic arthroscopy with partial medial meniscectomy and chondroplasty of the patella and chondroplasty of the femoral condyle of the right knee. Dr. Jansson released claimant from his treatment with no impairment or restrictions. Claimant was examined by board certified physical medicine and rehabilitation specialist Pedro A. Murati, M.D., on April 27, 2000. Dr. Murati rated claimant at a 7 percent impairment to the right lower extremity and a 12 percent impairment to the left lower extremity. He then deducted 5 percent from the right lower extremity rating for injuries suffered previously while claimant worked for Boeing. The resultant 6 percent whole body rating was the basis for a settlement entered into between claimant and Boeing on June 9, 2000. Claimant's right to future medical treatment and the right to review and modify the award were left open as part of the settlement. This was in Docket No. 253,800.

On August 13, 1999, claimant was laid off by Boeing. In September 1999, claimant began working for Cessna. He continued working there until April 2001, when he was rehired by Boeing. Claimant was, again, laid off by Boeing in April 2002. During claimant's employment with Cessna, and during the recent employment with Boeing, claimant had no

problem with his knees. From 2001 to 2004, claimant was self-employed, doing home repair and remodeling.[2] While self-employed, claimant had no problems with his knees.

In November 2004, claimant was again hired by Cessna. His original job with Cessna as a sheet metal worker was essentially the same as the job he worked for Boeing. The second time claimant was hired by Cessna, he worked for a year on wingmate. Then he moved to hydraulics. At the time of the regular hearing in this matter, in Docket Nos. 253,800 and 1,013,180, claimant remained in sheet metal and hydraulics.

On September 14, 2006, claimant suffered an injury to his right knee. As claimant got up from a creeper and placed weight on his right knee, his knee popped and he had an immediate burning sensation on the back end of his calf. Claimant reported the injury and was sent to Health Services. After conservative care, claimant returned to work. After this return to work, claimant's right knee worsened and while overcompensating for the right knee, he began to develop problems with his left knee as well. On October 24, 2006, claimant was moved to a lighter duty job involving mainly sit-down work.

Claimant was referred by his attorney to board certified physical medicine and rehabilitation specialist Michael Munhall, M.D. Dr. Munhall first saw claimant on October 30, 2006. The doctor's history indicated claimant had suffered a new injury to his right knee and an injury to his left knee as well. Dr. Munhall's report of October 30, 2006, also noted claimant had a 5 percent impairment to the right lower extremity after the 1998 surgery by Dr. Jansson.

The examination by Dr. Munhall identified right knee swelling, popping, and grinding. Claimant also displayed mild weakness of the left knee. Claimant described increased difficulties over the years. Bilateral knee x-rays displayed significant arthritis with a recommendation for an orthopedic opinion regarding the need for total knee replacements. Claimant's right knee displayed significant bone-on-bone deterioration with less degeneration in the left knee. Dr. Munhall determined that claimant had suffered injuries while at Boeing and aggravations and accelerations during his employment with Cessna. He rated claimant with a 37 percent impairment to the left lower extremity and a 41 percent impairment to the right lower extremity. He also noted the right leg with deep vein thrombosis which accounted for the higher rating. However, no other physician diagnosed the deep vein thrombosis.

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[2] On page 9 of claimant's discovery deposition, it states that in April 2001, claimant went back to work at Boeing, and that claimant worked for Boeing for a short period of time and then he was laid off by Boeing, and he then became self-employed. On pages 6-7 of that deposition, it states that claimant was laid off from Boeing in April 2002. On pages 8 and 12-13, it states that from 2001 to 2004, claimant was self-employed. According to pages 6-7 of the discovery deposition, the period from 2001 to 2004 should actually be 2002 to 2004. Claimant became self employed after being laid off by Boeing, which was in April 2002.

Claimant was referred by respondent, to orthopedic surgeon Paul C. Pappademos, M.D., for an evaluation. Claimant displayed limited range of motion of both knees, consistent with arthritis. Dr. Pappademos opined that, based on claimant's history, claimant suffered an injury to his right knee while working for Cessna. This right knee injury was an exacerbation and aggravation of his preexisting knee injuries. This accelerated the need for a total knee replacement in the right knee.

Claimant did not mention to Dr. Pappademos about an injury to his left knee but displayed symptoms. Dr. Pappademos agreed that, based on claimant's testimony and work history, claimant overcompensated following the right knee injury and aggravated the condition in his left knee. This accelerated the need for a total knee replacement in the left knee. Claimant underwent total knee arthroplasties, bilaterally, on February 19, 2007, under the hand of Dr. Pappademos. Both Dr. Pappademos and claimant found the result from these surgeries to be very good. Dr. Pappademos rated claimant at 37 percent to each lower extremity pursuant to the fourth edition of the AMA *Guides*.[3] When asked about the possibility of a preexisting condition, and after being provided information regarding Dr. Jansson's surgery and 5 percent rating from the surgeries in 1998, Dr. Pappademos was hesitant to express an opinion regarding whether the 5 percent could be considered preexisting in this situation.

Claimant was again referred by his attorney to Dr. Murati for an evaluation on October 10, 2007. Dr. Murati diagnosed claimant with post total knee arthroplasties, bilaterally. He rated claimant at 50 percent to each lower extremity, pursuant to the fourth edition of the AMA *Guides*.[4] However, when Dr. Murati was shown the section of the AMA *Guides* which limited the rating following a total knee replacement with a good result at 37 percent, he agreed to the lower rating. This, after being advised that claimant had testified to a good result from the surgeries and having no problems with the knees. Dr. Murati agreed, based on what he knows about the work done in manufacturing airplanes, and based on the information provided by claimant, that claimant's need for the total knee arthroplasties, bilaterally, was accelerated by both the injury to claimant's right knee and the aggravation of the condition in claimant's left knee due to claimant's having to favor the right knee after the injury.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.[5]

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[3] American Medical Association, *Guides to the Evaluation of Permanent Impairment* (4th ed.).

[4] AMA *Guides* (4th ed.).

[5] K.S.A. 2006 Supp. 44-501 and K.S.A. 2006 Supp. 44-508(g).

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.[6]

> If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.[7]

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

> . . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."[8]

There is no dispute that claimant suffered an injury to his right lower extremity on September 14, 2006, and that injury arose out of and in the course of his employment with Cessna. Additionally, Cessna has stipulated that a 37 percent impairment is appropriate for this injury. However, Cessna also alleges entitlement to a credit for the preexisting functional impairment stemming from claimant's earlier injuries while working for Boeing.

In workers' compensation litigation, when a primary injury under the Workers Compensation Act is shown to arise out of and in the course of employment, every natural consequence that flows from that injury, including a new and distinct injury, is compensable if it is a direct and natural result of the primary injury.[9]

K.S.A. 2006 Supp. 44-501(c) states:

> The employee shall not be entitled to recover for the aggravation of a preexisting condition, except to the extent that the work-related injury causes

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[6] *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

[7] K.S.A. 2006 Supp. 44-501(a).

[8] *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); *citing Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

[9] *Jackson v. Stevens Well Service*, 208 Kan. 637, 493 P.2d 264 (1972).

> increased disability. Any award of compensation shall be reduced by the amount of functional impairment determined to be preexisting.[7]

The dispute with regard to the right lower extremity in Docket No. 1,031,180 lies with the allegation of preexisting impairment and respondent's right to a credit for same. Claimant has had prior right knee problems from his employment with Boeing. He was rated for those injuries and settled the ongoing dispute with Boeing, with future medical treatment and review and modification left open. However, the prior injuries were to the meniscus. Here, claimant's condition is arthritis with resulting total knee arthroplasties. Dr. Pappademos was asked specifically about the connection between the prior problems and the current impairments, and he was unable to determine a medical connection. The Board finds Dr. Pappademos' opinion to be persuasive and denies respondent Cessna's request for a 5 percent credit under K.S.A. 2006 Supp. 44-501(c). In this regard, the award of the ALJ is affirmed.

It is well established under the Workers Compensation Act in Kansas that when a worker's job duties aggravate or accelerate an existing condition or disease, or intensify a preexisting condition, the aggravation becomes compensable as a work-related accident.[8]

In workers compensation litigation, it is not necessary that work activities cause an injury. It is sufficient that the work activities merely aggravate or accelerate a preexisting condition. This can also be compensable.[9]

Cessna contends that claimant's left lower extremity injury stems from the original injuries suffered while claimant was employed with Boeing. Boeing and claimant argue whether the injuries suffered while claimant was working for Cessna acted to aggravate and accelerate claimant's need for total knee arthroplasties, thus shifting the responsibility to Cessna. Dr. Murati, Dr. Pappademos and Dr. Munhall all agreed that the work for Cessna acted to accelerate and aggravate claimant's need for a total knee arthroplasty in claimant's left knee. As noted in *Demars*, this acts to create a compensable injury against the employer whose job duties aggravated the condition or accelerated the need for medical treatment. Here, claimant's duties at Cessna aggravated and accelerated claimant's need for a total left knee arthroplasty. This shifts the responsibility from Boeing to Cessna. Therefore, the award of the ALJ finding Cessna responsible for the costs associated with the left knee replacement is affirmed.

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[7] K.S.A. 2006 Supp. 44-501(c).

[8] *Demars v. Rickel Manufacturing Corporation*, 223 Kan. 374, 573 P.2d 1036 (1978).

[9] *Harris v. Cessna Aircraft Co.*, 9 Kan. App. 2d 334, 678 P.2d 178 (1984).

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be affirmed.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge John D. Clark dated September 17, 2008, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of January, 2009.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: David H. Farris, Attorney for Claimant
Kirby A. Vernon, Attorney for Respondent Boeing Company and its Insurance Carrier Insurance Company of the State of Pennsylvania
Dallas L. Rakestraw, Attorney for Respondent Cessna Aircraft Company
John D. Clark, Administrative Law Judge